

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * * * *

9 ALAMA ROBINSON,)
10 Plaintiff,) 3:09-CV-00202-LRH-VPC
11 v.) ORDER
12 WESTINGHOUSE AIR BRAKE)
13 TECHNOLOGIES CORPORATION, a)
14 Delaware corporation; WABTEC)
15 CORPORATION, a Pennsylvania)
16 Corporation; and DOES 1-20, inclusive,)
Defendants.)

)

17 Before the court is Defendants Westinghouse Air Brake Technologies Corporation and
18 Wabtec Corporation's Partial Motion to Dismiss (#15¹). In response, Plaintiff Alama Robinson
19 filed an opposition (#21) to which Defendants replied (#22).

20 **I. Facts and Procedural History²**

21 This is an employment discrimination dispute arising out of Plaintiff's employment as a
22 Production Manager at Wabtec's Carson City, Nevada location. Plaintiff began his employment
23 with Defendants on March 20, 2007.³ As a Production Manager, Plaintiff oversaw delivery and
24 shipping of requested parts to railroad clients, conducted quality assurance of equipment sold to
25

26 ¹Refers to the court's docket entry number.
27

28 ²The court has taken the following facts from the complaint.

³Defendant Wabtec is a subsidiary of Defendant Westinghouse. Westinghouse and Wabtec
manufacture and sell parts for the railroad industry.

1 railroad clients, and supervised staff in Wabtec's Manufacturing, Intake, and Delivery
 2 Departments.

3 Plaintiff alleges that throughout his employment, Wabtec employees harassed and
 4 discriminated against him because of his race. For example, Plaintiff alleges the following: (1)
 5 Plaintiff's direct supervisor and Plant Manager, Justin Warmack, and one of Plaintiff's
 6 subordinate employees, Michael Cross, referred to Chinese food as "Gook food"; (2) upon
 7 noticing Plaintiff's family photograph in his office, Warmack and Cross stated, "You got
 8 yourself a white girl" and laughed; (3) when Plaintiff asked William White, a co-worker, which
 9 employee would be responsible for a particular assignment, White replied, "That nigga over
 10 there" and pointed to David Lemaugh, a Samoan male; and (4) in May of 2008, in Plaintiff's
 11 presence, Warmack instructed Lemaugh to "nigger rig" a broken part that was due for shipment.
 12 (Compl. (#2) ¶¶ 23-27.)

13 In addition, Plaintiff alleges that at a drive-through window, when the attendant asked
 14 Plaintiff for her pen back, White stated, "Just like a black man, always trying to steal something."
 15 Warmack, who was present, laughed and later repeated the comment to Angelique Jones, an
 16 employee in Wabtec's Human Resources Department. Jones replied that such comments were
 17 inappropriate. In response, Warmack stated that he would not have hired Plaintiff if he did not
 18 believe Plaintiff could tolerate such statements.

19 On May 28, 2008, Plaintiff complained to Warmack about this treatment. Plaintiff also
 20 told Warmack that some of Plaintiff's subordinates were stealing customer property and failing
 21 to test products sold to customers. Warmack responded, "If it's fucked up, you fucked it up."
 22 (Compl. (#2) ¶ 32.)

23 Unsatisfied with Warmack's response, Plaintiff requested a meeting with Warmack and
 24 Jones. Although it is not clear how Jones responded to Plaintiff's complaints, as a result of the
 25 meeting, Warmack told Plaintiff to stay in his office at all times and prohibited him from
 26 speaking to other employees. Warmack also confiscated Plaintiff's office keys and company
 27 phone and began following Plaintiff and questioning each employee with whom Plaintiff spoke
 28 about the substance of the conversation.

1 On June 4, 2008, Plaintiff e-mailed Ronald Shannon, Wabtec's Human Resources
 2 Manager. Plaintiff asked Shannon if someone from Wabtec's corporate headquarters in
 3 Pennsylvania could come to the Carson City plant and investigate Plaintiff's complaints.
 4 Plaintiff received no response. Plaintiff also attempted to contact Shannon by telephone and
 5 received no response.

6 At some point, however, Shannon visited the Carson City plant and met with Plaintiff,
 7 Warmack, and Jones. In response to Plaintiff's complaints about discrimination, theft of
 8 customer property, and sales of untested equipment, Shannon attempted to resolve the situation
 9 informally and refused to conduct any further investigation.

10 On July 17, 2008, Plaintiff filed a claim with the Equal Employment Opportunity
 11 Commission ("EEOC"). Two days later, Wabtec received notice of the complaint. On July 23,
 12 2008, despite receiving a positive performance evaluation from Warmack, Plaintiff was
 13 terminated. On January 20, 2009, the EEOC issued to Plaintiff a Notice of Right to Sue.

14 **II. Legal Standard**

15 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). To
 16 survive a motion to dismiss for failure to state a claim, a complaint must satisfy the Federal Rule
 17 of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med.*
 18 *Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain "a short and plain
 19 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The
 20 Rule 8(a)(2) pleading standard does not require detailed factual allegations; however, a pleading
 21 that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of
 22 action" will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp.*
 23 *v. Twombly*, 550 U.S. 544, 555 (2007)).

24 Furthermore, Rule 8(a)(2) requires a complaint to "contain sufficient factual matter,
 25 accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 1949 (internal
 26 quotation marks omitted). A claim has facial plausibility when the pleaded factual content
 27 allows the court to draw the reasonable inference, based on the court's judicial experience and
 28 common sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. "The

1 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer
 2 possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely
 3 consistent with a defendant's liability, it stops short of the line between possibility and
 4 plausibility of entitlement to relief." *Id.* at 1949 (internal quotation marks and citation omitted).

5 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
 6 true. *Id.* (citation omitted). However, "bare assertions . . . amount[ing] to nothing more than a
 7 formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951)
 9 (alteration in original) (internal quotation marks omitted). The court discounts these allegations
 10 because they do "nothing more than state a legal conclusion – even if that conclusion is cast in
 11 the form of a factual allegation." *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) "In sum, for a complaint
 12 to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences
 13 from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*
 14 (quoting *Iqbal*, 129 S. Ct. at 1949).

15 **III. Discussion**

16 In the complaint, Plaintiff asserts the following claims for relief: (1) wrongful
 17 termination; (2) racial discrimination; (3) hostile work environment harassment; (4) retaliation;
 18 (5) breach of an implied contract; (6) intentional infliction of emotional distress; and (7)
 19 negligent infliction of emotional distress. Defendants concede that Plaintiff has stated a
 20 retaliation claim, but seek dismissal of the remainder of Plaintiff's claims.

21 **A. Wrongful Termination**

22 Plaintiff alleges Defendants wrongfully terminated him in violation of Nevada law
 23 because he complained about the inappropriate comments and reported that his co-workers were
 24 stealing and failing to test equipment. Defendants counter that the court should dismiss this
 25 claim because Nevada law does not recognize wrongful termination claims where federal and
 26 state anti-discrimination statutes provide an adequate remedy.

27 The court agrees. The Nevada Supreme Court does not recognize an action for tortious
 28 discharge where a plaintiff has an adequate, comprehensive statutory remedy. *Ozawa v. Vission*

1 *Airlines, Inc.*, 216 P.3d 788, 791 (Nev. 2009) (citing *D'Angelo v. Gardner*, 819 P.2d 206, 217
 2 (Nev. 1991)). Here, Title VII provides an adequate remedy for Plaintiff's discrimination and
 3 retaliation claims. *See Jones v. Reno Hilton Resort Corp.*, 889 F. Supp. 408, 412 n.4 (D. Nev.
 4 1995) (noting that the Nevada Supreme Court would consider the remedies available under Title
 5 VII comprehensive enough to bar the plaintiff's tortious discharge claim). Because the Nevada
 6 court would not recognize a wrongful termination claim under these circumstances, dismissal of
 7 the claim is warranted.

8 **B. Discrimination**

9 Plaintiff alleges Defendants discriminated against him on the basis of his race in violation
 10 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. To prevail on a
 11 discrimination claim, the plaintiff must establish a prima facie case of discrimination by
 12 presenting evidence that "gives rise to an inference of unlawful discrimination." *Cordova v.*
 13 *State Farm Ins. Co.*, 124 F.3d 1145, 1148 (9th Cir. 1997); *see also McDonnell Douglas Corp. v.*
 14 *Green*, 411 U.S. 792, 802 (1973). A plaintiff can establish a prima facie case of discrimination
 15 through either the burden shifting framework set forth in *McDonnell Douglas* or with direct or
 16 circumstantial evidence of discriminatory intent. *See Metoyer v. Chassman*, 504 F.3d 919, 931
 17 (9th Cir. 2007) ("When responding to a summary judgment motion . . . [the plaintiff] may
 18 proceed using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or
 19 circumstantial evidence demonstrating that a discriminatory reason more likely than not
 20 motivated [the employer].") (citation omitted) (alterations in original).

21 Under the *McDonnell Douglas* framework, the plaintiff carries the initial burden of
 22 establishing a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. To
 23 establish a prima facie case, the plaintiff must show that (1) he belongs to a protected class; (2)
 24 he was qualified for her position; (3) he suffered an adverse employment action; and (4) similarly
 25 situated individuals outside of his protected class were treated more favorably. *Davis v. Team*
 26 *Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (*citing Chuang v. Univ. of Cal. Davis*, 225 F.3d
 27 1115, 1126 (9th Cir. 2000)). If the plaintiff succeeds in establishing a prima facie case, the
 28 burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly

1 discriminatory conduct. *McDonnell Douglas*, 411 U.S. at 802. If the defendant provides such a
 2 justification, the burden shifts back to the plaintiff to show that the defendant's justification is a
 3 mere pretext for discrimination. *Id.* at 804.

4 Defendants fault the complaint for failing to allege facts (1) concerning or naming white
 5 employees who were treated differently than Plaintiff and (2) describing any employment action
 6 taken because of Plaintiff's race. The court disagrees and finds that Plaintiff has stated a claim
 7 upon which relief can be granted. In the complaint, Plaintiff alleges he was treated differently
 8 than similarly situated white employees and identifies various incidents evidencing
 9 discriminatory animus on the part of Wabtec employees.⁴ Although it is yet to be seen whether
 10 the animus of these employees contributed to Plaintiff's termination, on these facts, Plaintiff is
 11 entitled to conduct discovery and to present evidence in support of his discrimination claim.

12 **C. Hostile Work Environment**

13 Although not explicitly included in the text of Title VII, claims based on a hostile work
 14 environment fall within Title VII's protections. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).
 15 To survive summary judgment on a hostile work environment claim, “[a plaintiff] must raise a
 16 triable issue of fact as to whether (1) [he] was ‘subjected to verbal or physical conduct’ because
 17 of [his] race, (2) ‘the conduct was unwelcome,’ and (3) ‘the conduct was sufficiently severe or
 18 pervasive to alter the conditions of [the plaintiff’s] employment and create an abusive work
 19 environment.’” *Manatt v. Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003) (quoting *Kang v. U.*
 20 *Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002)).

21 Defendants argue Plaintiff has failed to state a claim for hostile work environment
 22 because the allegations in the complaint do not amount to severe and pervasive harassment. To
 23 determine whether conduct was sufficiently severe or pervasive to create a hostile work
 24 environment, the court considers “all the circumstances, including the frequency of the
 25 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere

27 ⁴The court notes that because the parties have not engaged in discovery, at this stage in the
 28 proceedings it would be difficult for Plaintiff to allege specific facts demonstrating how Defendants
 treated similarly situated white individuals.

1 offensive utterance; and whether it unreasonably interferes with an employee's work
 2 performance." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) (citation and
 3 internal quotation marks omitted). "[S]imple teasing, offhand comments, and isolated incidents
 4 (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions
 5 of employment.'" *Id.* at 271 (citation omitted). The ultimate question is whether a reasonable
 6 person would consider the conduct sufficiently severe or pervasive to alter the conditions of
 7 employment and create an abusive working environment. *Ellison v. Brady*, 924 F.2d 872, 879
 8 (9th Cir. 1991).

9 The court finds that the conduct alleged in the complaint could rise to the level of severity
 10 or pervasiveness required to support a hostile work environment claim. As a result, the court will
 11 deny dismissal of this claim.

12 **D. Breach of Implied Contract**

13 In his fifth claim for relief, Plaintiff alleges Defendants breached an implied contract for
 14 his continued employment. Plaintiff alleges this contract was created by the following: (1)
 15 favorable formal and informal job performance reviews; (2) the lack of any direct negative
 16 criticism of his job performance; (3) compliments from his supervisors and colleagues; and (4)
 17 promises of continued employment.

18 Under Nevada law, employment contracts are presumably terminable at will. *Yeager v.*
19 Harrah's Club, Inc., 897 P.2d 1093, 1095 (Nev. 1995). "An employee may rebut this
 20 presumption by proving by a preponderance of the evidence that there was an express or implied
 21 contract between his employer and himself that his employer would fire him only for cause."
22 Am. Bank Stationery v. Farmer, 799 P.2d 1100, 1101-02 (Nev. 1990).

23 Here, the allegations in Plaintiff's complaint do not suggest that Defendants promised
 24 Plaintiff that he would be fired only for cause. "General expressions of long term employment or
 25 job advancement do not convert an at-will employment contract to a termination only for cause
 26 contract." *Vancheri v. GNLV Corp.*, 777 P.2d 366, 369 (Nev. 1989). Further, that Plaintiff
 27 believed he would not be discharged without cause is not controlling. Employment contracts
 28 cannot be created by the subjective expectations of the employee. *Id.* (citations omitted).

1 Accordingly, the court finds that under the facts alleged in the complaint, Plaintiff's employment
 2 was at-will and cannot support a breach of contract claim.

3 **E. Intentional Infliction of Emotional Distress**

4 To establish a claim for intentional infliction of emotional distress, the plaintiff must
 5 demonstrate the following: (1) "extreme and outrageous conduct with either the intention of, or
 6 reckless disregard for, causing emotional distress"; (2) severe or extreme emotional distress; and
 7 (3) actual or proximate causation. *Star v. Rabello*, 625 P.2d 90, 92 (Nev. 1981) (citation
 8 omitted).

9 Extreme and outrageous conduct "is that which is 'outside all possible bounds of
 10 decency' and is regarded as 'utterly intolerable in a civilized community.'" *Maduike v. Agency*
 11 *Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (citations omitted). This is not such a case. The court
 12 finds no allegation in the complaint that amounts to extreme and outrageous conduct. As such,
 13 the court will dismiss the intentional infliction of emotional distress claim.

14 **F. Negligent Infliction of Emotional Distress**

15 "[I]n cases where emotional distress damages are not secondary to physical injuries, but
 16 rather, precipitate physical symptoms, either a physical impact must have occurred, or in the
 17 absence of physical impact, proof of 'serious emotional distress' causing physical injury or
 18 illness must be presented." *Barmettler v. Reno Air, Inc.*, 856 P.2d 1382, 1387 (Nev. 1998).
 19 General physical or emotional discomfort are insufficient to establish a claim for negligent
 20 infliction of emotional distress. *Id.* (citation omitted).

21 Here, there is no allegation of physical impact or serious emotional distress causing
 22 physical injury or illness. In the complaint, Plaintiff alleges that he suffered "severe physical,
 23 mental, and emotional distress and discomfort, including, but not limited to, suffering anguish,
 24 fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame . . ." (Compl.
 25 ¶ 101.) Despite vaguely alleging that he suffered "severe physical" distress, Plaintiff does
 26 not allege that he suffered physical injury or illness either before or after the alleged emotional
 27 distress. Dismissal of this claim is therefore warranted.

28 // /

1 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (#15) is GRANTED
2 in part and DENIED in part.

3 IT IS SO ORDERED.

4 DATED this 1st day of April, 2010.



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6 LARRY R. HICKS
7 UNITED STATES DISTRICT JUDGE
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